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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company and The Toledo )  
Edison Company for Authority to ) Case No. 10-388-EL-SSO  
Establish a Standard Service Offer )  
Pursuant to R.C. § 4928.143 in the Form )  
of an Electric Security Plan. )

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JOINT INTERLOCUTORY APPEAL, MOTION FOR CERTIFICATION TO  
FULL COMMISSION  
AND APPLICATION FOR REVIEW  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
CITIZEN POWER,  
CITIZENS COALITION,  
NATURAL RESOURCES DEFENSE COUNCIL,  
AND THE  
OHIO ENVIRONMENTAL COUNCIL

---

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

Jeffrey L. Small, Counsel of Record  
Gregory J. Poulos  
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
614-466-8574 (T)  
614-466-9475 (F)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[poulos@occ.state.oh.us](mailto:poulos@occ.state.oh.us)

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Theodore Robinson  
Staff Attorney and Counsel  
**Citizen Power**  
2121 Murray Avenue  
Pittsburgh, PA 15217  
(412) 421-7029 (T)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)

Joseph P. Meissner, Counsel of Record  
Matthew D. Vincel  
The Legal Aid Society of Cleveland  
1223 West 6th Street  
Cleveland, OH 44113  
(216) 216-687-1900 (T)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincel@lasclev.org](mailto:mvincel@lasclev.org)  
**Citizens Coalition**

Henry Eckhart  
50 West Broad Street, #2117  
Columbus, OH 43215  
Phone: (614) 461-0984  
Fax: (614) 221-7401  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
**Natural Resources Defense Council**

Nolan Moser  
1207 Grandview Ave., Ste. 201  
Columbus, OH 43212-3449  
Voice (614) 487-7506  
Fax (614) 487-7510  
[nmoser@theOEC.org](mailto:nmoser@theOEC.org)  
**Ohio Environmental Council**

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The undersigned members of the Ohio Consumer and Environmental Advocates (collectively, "Movants") hereby jointly submit this Interlocutory Appeal to the Public Utilities Commission of Ohio ("PUCO" or "Commission"). Movants respectfully move the legal director, deputy legal director, attorney examiner, or presiding hearing officer to certify this appeal to the full Commission for review.<sup>1</sup> This Interlocutory Appeal should be certified to allow the Commission to review the Attorney Examiner's decision issued on March 24, 2010 ("AE Entry") and to modify that decision.

As set forth in the attached Memorandum in Support, the AE Entry established a procedural schedule that does not permit parties to adequately prepare for a hearing and

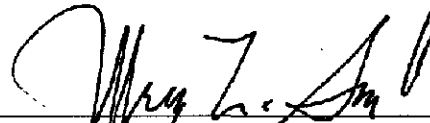
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<sup>1</sup> Ohio Adm. Code 4901-1-15(B). Ohio Adm. Code 4901-1-15(B).

sets an early cut-off for interested persons to intervene. The expedited and compressed procedural schedule limits due process and unduly prejudices Movants, in violation of Ohio statutes, case law precedent, and the Commission's rules. The Commission should modify the AE Entry to permit intervening parties to submit testimony no later than May 10, 2010, and set a date for the hearing that corresponds to the later timeline permitted for the submission of testimony.

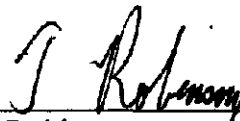
Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record  
Gregory J. Poulos  
Assistant Consumers' Counsel

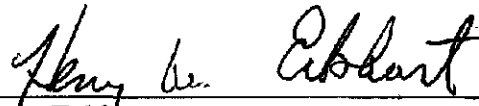

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
614-466-8574 (T)  
614-466-9475 (F)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[poulos@occ.state.oh.us](mailto:poulos@occ.state.oh.us)



Theodore Robinson  
Staff Attorney and Counsel  
**Citizen Power**  
2121 Murray Avenue  
Pittsburgh, Pa 15217  
(412) 421-7029 (T)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)



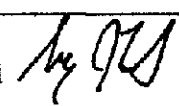
Joseph P. Meissner, Counsel of Record  
Matthew D. Vincel  
The Legal Aid Society of Cleveland  
1223 West 6th Street  
Cleveland, OH 44113  
(216) 216-687-1900 (T)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincel@lasclev.org](mailto:mvincel@lasclev.org)  
**Citizens Coalition**



Henry Eckhart  
50 West Broad Street, #2117  
Columbus, OH 43215  
(614) 461-0984 (T)  
(614) 221-7401 (F)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
**Natural Resources Defense Council**



Nolan Moser  
1207 Grandview Ave., Ste. 201  
Columbus, OH 43212-3449  
(614) 487-7506 (T)  
(614) 487-7510 (F)  
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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

On March 23, 2010, at 5:27 p.m., the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy” or the “Company”) filed an Application in the above-captioned matter to establish standard service offer (“SSO”) generation rates and determine other matters that are the subject of a Stipulation and Recommendation (“Stipulation”) attached to, and made part of the Application. The Stipulation was executed by FirstEnergy, the PUCO Staff, and other parties to the already pending SSO case (Case No. 09-906-EL-SSO, the “MRO Case”), but was not agreed to by the Movants and other parties to the MRO Case.

One minute later, at 5:28 p.m. on March 23, FirstEnergy filed a Motion for Waiver of Rules that was accompanied by a Request for an Expedited Ruling. FirstEnergy certified that no parties existed to contact regarding whether they opposed an early ruling without the filing of opposing memoranda.<sup>2</sup> The Motion for Waiver of Rules

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<sup>2</sup> FirstEnergy’s Motion for Waiver of Rules at 2, footnote 1 (March 23, 2010).

requested, *inter alia*, waiver of the Commission's rule governing ESP proceedings that provides interested persons forty-five days in which to intervene.

The next day, on March 24, 2010, the AE Entry was issued that established a procedural schedule for this case. The procedural schedule included thirteen days from the day of the initial filing for interested parties to intervene in this case (April 5, 2010), provided a mere twenty-one days for intervening parties and the PUCO Staff to file testimony (April 13, 2010), and set the hearing date for a mere twenty-eight days after FirstEnergy's date of filing (April 20, 2010).<sup>3</sup> The schedule provided for expedited discovery on a ten-day basis,<sup>4</sup> but the remainder of the schedule means that parties are provided only a single round of discovery before being required to file testimony. The AE Entry is the subject of this appeal.

Movants have been active in this case since its inception on March 23, 2010. On March 24, 2010, the Office of the Ohio Consumers' Counsel ("OCC") moved to intervene and requested expedited discovery.<sup>5</sup> On March 25, 2010, Movants were among the parties that filed a Joint Memorandum Contra FirstEnergy's Motion for Waiver of Rules. In the Joint Memorandum Contra, Movants argued that FirstEnergy failed to present good cause (in many instances, failed to present any cause) for many of the specific waivers requested and that Commission precedent as well as sound policy should prevent broad waivers from being approved.<sup>6</sup> Movants also argued that Ohio Adm. Code 4901-1-12(C) was not intended to provide an applicant the initial opportunity to submit

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<sup>3</sup> AE Entry at 3, ¶(6).

<sup>4</sup> Id. at 3, ¶(8).

<sup>5</sup> The other Movants, who had not yet moved to intervene, supported the OCC's Motion for Expedited Discovery as stated in a footnote. OCC Motion for Expedited Discovery at 2, footnote 1 (March 24, 2010).

<sup>6</sup> Joint Memorandum Contra Motion for Waiver of Rules at 3-10 (March 25, 2010).



motions and obtain expedited rulings before parties had any opportunity to intervene and state their opposition to the motions.<sup>7</sup>

On March 26, 2010, the OCC issued discovery to FirstEnergy. The OCC also contacted FirstEnergy's counsel of record by telephone on March 26, 2010 (after e-mail messages went unanswered on two previous days) regarding the execution of a protective agreement to facilitate discovery. The OCC's counsel was informed that the Company was not prepared at that time to enter into a protective agreement on the same terms as those used in the pending MRO Case.

## **II. OHIO LAW REGARDING ELECTRIC SECURITY PLAN APPLICATIONS**

FirstEnergy proposes an electric security plan ("ESP"), which is partly governed by the requirements of R.C. Chapter 4928 and, more particularly, R.C. 4928.143. R.C. 4928.143(C)(1) provides that the "commission shall issue an order . . . for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any application by the utility . . . , not later than two hundred seventy-five days after the application's filing date." FirstEnergy filed its first ESP application on July 31, 2008, soon after enactment of S.B. 221.<sup>8</sup> The new Application contains a "subsequent" FirstEnergy ESP that, as established under Ohio law, must be decided in two hundred seventy-five days.

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<sup>7</sup> Id. at 10-11 (March 25, 2010).

<sup>8</sup> The hearing in the 2008 ESP case was scheduled sixty-seven days after FirstEnergy filed its application. In re FirstEnergy's 2008 ESP Proposal, Entry at 1 (September 20, 2008). Despite having an additional one hundred twenty-five days to decide this subsequent ESP case, the hearing date stated in the AE Entry is only twenty-eight days after FirstEnergy's application.

The Commission's rules amplify the contents of R.C. Chapter 4928 regarding involving interested persons in an ESP proceeding. Ohio Adm. Code 4901:1-35-06 provides "[i]nterested persons wishing to participate in the hearing . . . *forty-five days* [to intervene] after the issuance of the entry scheduling the hearing."<sup>9</sup> The Attorney Examiner reduced this period to *twelve days* after the AE Entry scheduled the hearing.<sup>10</sup>

The PUCO need not act on an ESP application as soon as it would for a Market Rate Offer ("MRO") application under R.C. 4928.142 -- where a ninety-day period applies for a decision on a MRO<sup>11</sup> -- but an ESP and a MRO application share procedural requirements.<sup>12</sup>

The commission shall set the time for hearing of a filing under section 4928.142 [i.e. a MRO filing] or 4928.143 [i.e. an ESP filing] of the Revised Code, send written notice of the hearing to the electric distribution utility, and *publish notice in a newspaper of general circulation* in each county in the utility's certified territory.

The additional time provided for an ESP corresponds to its potential added complexity, a situation that is presented in FirstEnergy's Application. Approval of an ESP requires the additional determination by the PUCO that the ESP "is more favorable in the aggregate as compared to the expected results [under a MRO]."<sup>13</sup> "The burden of proof in the proceeding shall be on the electric distribution utility."<sup>14</sup>

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<sup>9</sup> Emphasis added.

<sup>10</sup> AE Entry at 3 (March 24, 2010).

<sup>11</sup> R.C. 4928.142(B).

<sup>12</sup> R.C. 4928.141(B) (emphasis added).

<sup>13</sup> R.C. 4928.143(C)(1).

<sup>14</sup> Id.

Ohio Adm. Code 4901:1-35-04(B) elaborates on this statutory requirement and requires the ESP applicant to submit “a proposed notice for newspaper publication that fully discloses the substance of the application, including rates impacts, and that prominently states that any person may request to become a party to the proceeding.” Rather than comply with Ohio Adm. Code 4901:1-35-04(B), FirstEnergy moved to waive the requirement.<sup>15</sup> The AE Entry cuts off interventions on April 5, 2010, without any arrangement whatsoever to notify the public that interested persons may become a party.<sup>16</sup>

R.C. 4903.082 requires “ample rights of discovery” in proceedings before the Commission. More specifically to the circumstances of SSO cases, R.C. 4928.145 provides for discovery of certain matters from applicant utilities.

[U]pon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or arrangement that is between the utility and any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision . . . .

The Supreme Court of Ohio’s reversal of an attorney examiner’s denial of the OCC right to discovery regarding a stipulation in a rate stabilization plan case is precedent for the appropriateness of inquiries into the circumstances surrounding the execution of the Stipulation.<sup>17</sup>

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<sup>15</sup> FirstEnergy Motion for Waiver of Rules at 4-5 (March 23, 2010).

<sup>16</sup> AE Entry at 3, ¶(6)(c) (March 24, 2010).

<sup>17</sup> *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”). The decision in *Consumers’ Counsel 2006* was partly codified in R.C. 4928.145, both of which provide for additional transparency in the Commission’s proceedings.

### **III. THIS APPEAL SHOULD BE CERTIFIED FOR FULL COMMISSION DETERMINATION.**

Certification of this Interlocutory Appeal to the full Commission should be granted so that the Commission reviews the AE Entry and orders a procedural schedule that complies with Ohio law. Ohio Adm. Code 4901-1-15(B) provides a two-part test regarding certification to the Commission for a decision on this appeal. The appeal should be certified if “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent.” Second, the appeal should be certified if “an immediate determination by the commission is needed to prevent the likelihood of undue prejudice.” Both of these circumstances exist.

The circumstances presented are novel issues of scheduling and its relationship to the procedural rights of parties. Although the AE Entry largely follows the form stated in the FirstEnergy ESP proceeding that was initiated in 2008,<sup>18</sup> the change in timeframes in the case brought in 2010 raises the serious issue regarding the denial of parties’ right to ample discovery as provided for in R.C. 4903.082 and the right to the information referenced in R.C. 4928.145.

The procedural schedule in 2008 was actually extended by fourteen days from that set forth originally, limited from even greater extension due to “the statutory deadline for resolution of these [ESP] issues.”<sup>19</sup> In this case, the statutory deadline is two hundred seventy-five days rather than one hundred fifty days that was applicable to the earlier ESP proceeding, yet the procedural schedule stated in the AE Entry provides an

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<sup>18</sup> *In re FirstEnergy’s 2008 ESP Proceeding*, Entry (August 5, 2008).

<sup>19</sup> *Id.*, Entry at 2 (September 5, 2008).

extremely tight timeframe to conduct discovery and to prepare testimony based upon that discovery. This situation is very different than presented in 2008 (or any other ESP proceeding). The attention paid by the General Assembly to lengthening the review period for ESPs submitted after 2008 has, as the result of the AE Entry, been brushed aside in the very first proceeding where the two hundred seventy-five day timeline applies.

Furthermore, the action to set a procedural schedule in the AE Entry less than twenty-four hours after waiver requests were filed (i.e. those that accompanied the Application) raises the novel question of Commission policy towards requests for expedited rulings submitted along with an Application such that no parties could exist at the time the request is submitted. Ohio Adm. Code 4901-1-12(C) regarding requests for expedited rulings should not be interpreted to provide applicants a one-time, unique opportunity to request and obtain expedited rulings without the filing of opposing memoranda. In this instance, the Commission rule regarding the vital right of parties to intervene was waived upon the request of FirstEnergy under circumstances where both the Company and the AE had reason to believe that opposition to the expedited decision existed. The Commission itself should revisit this important policy issue.

The circumstances also show that an immediate determination is needed by the full Commission in order to prevent the injustice of having an expedited procedural schedule -- a schedule entirely unnecessary based upon the review permitted by statute and the extensive review contemplated in the Commission's rules regarding ESP proceedings -- render opposition to FirstEnergy's Application ineffective. The present

circumstances threaten to abridge Movants' effective participation in this proceeding, a serious matter that should be addressed by the full Commission.

#### **IV. THE COMMISSION SHOULD REVIEW AND MODIFY THE AE ENTRY**

##### **A. The Procedural Schedule is Legally Flawed.**

##### **1. The AE Entry Should be Modified to Permit Ample Discovery and the Submission of Intervenor Testimony No Later than May 10, 2010 and to Set a New Date for Hearing.**

As stated above, discovery must be "ample" in proceedings before the Commission. The AE Entry addresses discovery, and provides for expedited discovery on a ten-day basis,<sup>20</sup> but the consequences of the procedural schedule is that Movants are limited to discovery without the possibility of following up on initial responses. Such follow-up discovery can be important, whether the respondent to the discovery is cooperative with the requests or not. The Commission should provide an opportunity to repeat this sequence of discovery in order to provide "ample rights of discovery."<sup>21</sup>

Even discovery issued on the day of the AE Entry followed by discovery issued the day the first round responses were received -- i.e. based upon the hypothetical where discovery is timely answered, without dispute -- would result in receipt of the follow-up discovery on the day testimony is due. FirstEnergy asks for a Commission order by no later than May 5, 2010,<sup>22</sup> and the AE Entry states that the expedited procedural schedule is due to FirstEnergy's proposal to conduct a competitive bid in July 2010.<sup>23</sup> The Application, the timing of which FirstEnergy controlled, was filed too late to meet the

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<sup>20</sup> Id. at 3, ¶(8).

<sup>21</sup> R. C. 4903.082.

<sup>22</sup> Application at 1.

<sup>23</sup> AE Entry at 2, ¶(6).

requirement that Movants receive “ample” discovery (i.e. pursuant to R.C. 4903.082) before any decision is rendered in an open, transparent, and fair proceeding regarding whether a July 2010 auction (proposed in the Application) should take place in Ohio.<sup>24</sup>

This case involves a hearing that will consider a stipulation that is opposed by Movants and possibly by other parties. A similar situation was encountered in the PUCO case underlying *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”) in which the Supreme Court of Ohio upheld the OCC’s right to inquire into agreements outside the principal stipulation for purposes of presenting relevant evidence against the adoption of a stipulation.

The non-viable limitations contained in the timeline stated in the AE Entry can be illustrated with reference to the recent FirstEnergy MRO Case. Discovery inquiry into the agreements by FirstEnergy-affiliated companies, pursuant to R.C. 4928.145 and case law, became the subject of a time-consuming dispute where an entry was issued compelling FirstEnergy to respond to discovery.<sup>25</sup> The difficulties in this case may be compounded by a situation where FirstEnergy has thus far refused to enter into a protective agreement on the same terms of the agreement that was reached with the OCC.

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<sup>24</sup> If the purpose of a July 2010 auction is to “lock in” low prices, the Company’s sworn testimony disputes the effectiveness of holding an early auction. FirstEnergy Witness Schnitzer testified that “forward market prices for power to be delivered in future years already reflect the market’s judgment” that electricity prices will increase. *In re FirstEnergy’s 2009 MRO Proposal*, Case No. 09-906-EL-SSO, FirstEnergy Ex. 13 at 38 (Schnitzer).

<sup>25</sup> *In re FirstEnergy’s 2009 MRO Proceeding*, Entry at 1 (December 7, 2009). Discovery responses on the part of FirstEnergy Solutions was also compelled. *Id.*, Tr. Vol. 1 at 20 (December 15, 2009). Since this case is new, FirstEnergy and FirstEnergy Solutions are expected to raise the same issues regarding whether they are permitted to provide information on individual customers as part of discovery. See OCC Motion for Expedited Discovery at 6-7 (March 24, 2010); see also *In re FirstEnergy’s 2009 MRO Proceeding*, Tr. Vol. 1 at 20 (December 15, 2009) (“[FirstEnergy Solutions is] prohibited by tariff and by certain Commission regulations from releasing customer information”).

in the MRO Case.<sup>26</sup> The time permitted in the AE Entry for discovery is too short for adequate investigation of a complex Application, and this situation is worsened by the likelihood of discovery disputes under the current circumstances.

The totality of the procedures set out in the AE Entry result in the denial of Movants' right to ample discovery. The schedule timeframes for proceeding in this case must be pushed back to ensure Movants' rights to develop their cases. Following the initial procedural timeline ordered in FirstEnergy's 2008 ESP proceeding,<sup>27</sup> the testimony of intervening parties should not be required until May 10, 2010 which will permit a longer period for discovery.

**2. The AE Entry Fails to Recognize the Link Between Notice and the Date When Intervention is Due.**

The AE Entry appears to state that the statutorily required publication of notice will take place in conjunction with, or at least contemporaneously with, notice regarding local public hearings.<sup>28</sup> But the statutorily required notice is at least partially intended to invite interested parties to *participate in the proceeding as parties*, which cannot happen unless the notice is provided much earlier than the deadline for intervention. Ohio Adm. Code 4901:1-35-04(B) states that the newspaper notice must "prominently state[ ] that any person may request to become a party to the proceeding." As of the date of this pleading, a mere seven days remains before the deadline without any arrangement for publication of the notice.

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<sup>26</sup> On March 26, 2010, FirstEnergy Solutions executed a protective agreement with the OCC on the same terms that governed the release of information by FirstEnergy Solutions in the MRO Case.

<sup>27</sup> As stated elsewhere, the statutory period for consideration of this case is much *longer* than that provided for FirstEnergy's 2008 ESP case.

<sup>28</sup> "Local public hearings, will be scheduled, and publication of notice required, by subsequent entry." AE Entry at 3, ¶(7).



The deadline for intervention, April 5, 2010, is too early. The provision in the AE Entry for granting party status to parties to the MRO Case is insufficient to remedy the problem because the universe of persons interested in being a party to this case is not immediately apparent. The Stipulation encompasses a much broader range of issues and proposes to settle non-SSO cases and even issues related to federal proceedings. The deadline for interested persons to intervene should be modified and set for a later date.

**B. FirstEnergy's Request for an Expedited Ruling Regarding the Waiver of Ohio Adm. Code 4901:1-35-06 on the Subject of the Deadline for Intervention Should Not Have Been Granted Without Hearing Opposing Arguments.**

The deadline for interested persons to intervene was limited to twelve days -- greatly reduced from the forty-five days provided in Ohio Adm. Code 4901:1-35-06 -- after the procedural schedule was set in the AE Entry. The AE Entry essentially granted the waiver request the next day after FirstEnergy asked that "the forty-five day period for intervention [be waived] . . . ." <sup>29</sup> Pursuant to Ohio Adm. Code 4901-1-12(C), such a request should not have been granted until memoranda opposing the waiver were heard. <sup>30</sup>

The method used to achieve the result stated above was for FirstEnergy to submit its Motion for Waiver of Rules one minute after filing its Application. This sequence of events assured that no other entity would be a party to the case at the time the motion was filed. Although FirstEnergy surely knew of opposition to the Stipulation and could have contacted those parties regarding the waivers, FirstEnergy sought an expedited ruling on its waiver requests based upon the technicality that "formal intervention ha[d] not yet

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<sup>29</sup> FirstEnergy Motion for Waiver of Rules at 5 (March 23, 2010).

<sup>30</sup> Movants submitted a Joint Memorandum Contra FirstEnergy's Motion for Waiver of Rules on March 26, 2010. However, the requested waiver regarding the forty-five days in the Commission's rules had already been granted.

been granted” to any other party. The Commission’s rule regarding requests for an expedited ruling was intended to provide interested persons an opportunity to submit responsive memoranda under circumstances where a motion involved disputed matters. FirstEnergy’s request for waiver of the rule that permits parties forty-five days to intervene should not have been granted without any opportunity for opposing argument. Ohio Adm. Code 4901-1-12(F) does not provide for an immediate ruling on a motion unless the ruling “will not adversely affect a substantial right of any party.” Intervention is a substantial right, and an opportunity should have been provided for interested persons to oppose FirstEnergy’s waiver request.

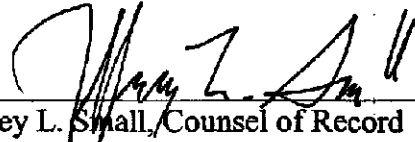
## **V. CONCLUSION**

For the reasons set forth above, this appeal should be certified to the full Commission and the Commission should reverse the Attorney Examiner’s ruling by granting additional time for persons to file their interventions and for Movants to conduct discovery in advance of filing testimony. The hearing date should be adjusted correspondingly.

The procedural schedule stated in the AE Entry will limit the effectiveness of the Commission’s review of the Application on the record. Given the magnitude of this proceeding, a thorough proceeding that creates an informative record is warranted. A rushed schedule without adequate public notice limits the process provided to Movants, which may result in an unjust and unreasonable outcome.

Respectfully submitted,

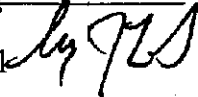
JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL




Jeffrey L. Small, Counsel of Record  
Gregory J. Poulos  
Assistant Consumers' Counsel

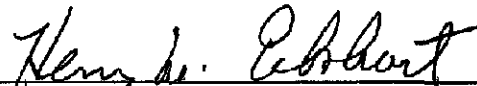
**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
614-466-8574 (T)  
614-466-9475 (F)  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[poulos@occ.state.oh.us](mailto:poulos@occ.state.oh.us)



Theodore Robinson  
Staff Attorney and Counsel   
**Citizen Power**  
2121 Murray Avenue  
Pittsburgh, Pa 15217  
(412) 421-7029 (T)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)

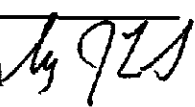


Joseph P. Meissner, Counsel of Record   
Matthew D. Vincel  
The Legal Aid Society of Cleveland  
1223 West 6th Street  
Cleveland, OH 44113  
(216) 216-687-1900 (T)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincel@lasclev.org](mailto:mvincel@lasclev.org)  
**Citizens Coalition**



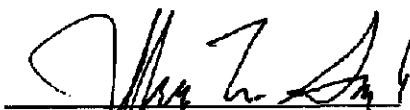
Henry Eckhart  
50 West Broad Street, #2117  
Columbus, OH 43215  
(614) 461-0984 (T)  
(614) 221-7401 (F)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
**Natural Resources Defense Council**



Nolan Moser  
1207 Grandview Ave., Ste. 201   
Columbus, OH 43212-3449  
(614) 487-7506 (T)  
(614) 487-7510 (F)  
[nolan@theOEC.org](mailto:nolan@theOEC.org)  
**Ohio Environmental Council**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Interlocutory Appeal was served by electronic service to the counsel identified below (provided electronically to the Attorney Examiners) this 29<sup>th</sup> day of March 2010.



Jeffrey L. Small  
Assistant Consumers' Counsel

## SERVICE LIST

[burkj@firstenergycorp.com](mailto:burkj@firstenergycorp.com)  
[korkosza@firstenergycorp.com](mailto:korkosza@firstenergycorp.com)  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  
[elmiller@firstenergycorp.com](mailto:elmiller@firstenergycorp.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[lmcalister@mwncmh.com](mailto:lmcalister@mwncmh.com)  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)  
[david.fein@constellation.com](mailto:david.fein@constellation.com)  
[Cynthia.bradley@constellation.com](mailto:Cynthia.bradley@constellation.com)  
[dboehm@BKLlawfirm.com](mailto:dboehm@BKLlawfirm.com)  
[mkurtz@BKLlawfirm.com](mailto:mkurtz@BKLlawfirm.com)  
[RTriozi@city.cleveland.oh.us](mailto:RTriozi@city.cleveland.oh.us)  
[SBeeler@city.cleveland.oh.us](mailto:SBeeler@city.cleveland.oh.us)  
[Cmooney2@columbus.rr.com](mailto:Cmooney2@columbus.rr.com)  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[Thomas.mcnamee@puc.state.oh.us](mailto:Thomas.mcnamee@puc.state.oh.us)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)  
[mhpetricoff@vssp.com](mailto:mhpetricoff@vssp.com)  
[mwarnock@bricker.com](mailto:mwarnock@bricker.com)  
[wis29@yahoo.com](mailto:wis29@yahoo.com)  
[cmiller@szd.com](mailto:cmiller@szd.com)  
[aporter@szd.com](mailto:aporter@szd.com)  
[gdunn@szd.com](mailto:gdunn@szd.com)  
[robinson@citizenpower.com](mailto:robinson@citizenpower.com)  
[Kim.Bojko@puc.state.oh.us](mailto:Kim.Bojko@puc.state.oh.us)  
[Gregory.Price@puc.state.oh.us](mailto:Gregory.Price@puc.state.oh.us)

[ricks@ohanet.org](mailto:ricks@ohanet.org)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[gkrassen@bricker.com](mailto:gkrassen@bricker.com)  
[mwarnock@bricker.com](mailto:mwarnock@bricker.com)  
[mk1@bbrslaw.com](mailto:mk1@bbrslaw.com)  
[gas@bbrslaw.com](mailto:gas@bbrslaw.com)  
[jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)  
[mwhite@cwslaw.com](mailto:mwhite@cwslaw.com)  
[myurick@cwslaw.com](mailto:myurick@cwslaw.com)  
[dmancino@mwe.com](mailto:dmancino@mwe.com)  
[glawrence@mwe.com](mailto:glawrence@mwe.com)  
[lkeiffer@co.lucas.oh.us](mailto:lkeiffer@co.lucas.oh.us)  
[nmoser@theOEC.org](mailto:nmoser@theOEC.org)  
[will@theOEC.org](mailto:will@theOEC.org)  
[trent@theOEC.org](mailto:trent@theOEC.org)  
[Williams.toddm@gmail.com](mailto:Williams.toddm@gmail.com)  
[Amy.Spiller@duke-energy.com](mailto:Amy.Spiller@duke-energy.com)  
[mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  
[mparke@firstenergycorp.com](mailto:mparke@firstenergycorp.com)  
[beitingm@firstenergycorp.com](mailto:beitingm@firstenergycorp.com)  
[Dane.Stinson@BaileyCavalieri.com](mailto:Dane.Stinson@BaileyCavalieri.com)  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)  
[jpmessn@lasclev.org](mailto:jpmessn@lasclev.org)  
[mvincel@lasclev.org](mailto:mvincel@lasclev.org)  
[jroberts@enernoc.com](mailto:jroberts@enernoc.com)  
[Duane.luckey@puc.state.oh.us](mailto:Duane.luckey@puc.state.oh.us)